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In The

# Supreme Court of the United States

DR. CHERYL GONCE-WARNER,

*Petitioner,*

v.

BAYLOR UNIVERSITY,

*Respondent.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

What is the proper standard under Title VII, 42 U.S.C. § 2000e, for establishing a prima facie case of sex discrimination and/or retaliation in a case involving a denial of tenure to a university professor?

## PARTIES TO THE PROCEEDING

Petitioner, Dr. Cheryl Gonce-Warner, is an individual with no corporate affiliation. Respondent, Baylor University, is a private university.

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## PETITION FOR A WRIT OF CERTIORARI

Petitioner Cheryl Gonce-Warner respectfully prays that a writ for certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit entered in the above proceedings on November 26, 2001.

## OPINIONS BELOW

The opinion of the court of appeals is not reported but it is reprinted in Petitioner's Appendix (App. 1-2), *infra*. The relevant order of the district court is also unpublished, but it too is reprinted in Petitioner's Appendix (App. 4-18), *infra*.

In her Petition for Rehearing before the Fifth Circuit, Petitioner ("Gonce-Warner") requested that the Fifth Circuit clarify and publish its Opinion and specifically identify the standard that it had applied to determine that summary dismissal of her gender discrimination claim was proper. Gonce-Warner sought clarification because the Fifth Circuit's opinion stated that the District Court's decision to grant summary judgment was affirmed because she failed to show "pretext"; however, Respondent's ("Baylor") Motion for Summary Judgment was limited to assertions that Gonce-Warner failed to prove a prima facie case of discrimination and/or retaliation. *See* App. 5, wherein the District Court enumerated the grounds for Baylor's Motion:

> " . . . Fourth that the Plaintiff cannot make out a prima facie case of gender discrimination under Title VII. Finally, that the Plaintiff cannot make out a prima facie case of retaliation."

Without clarification and/or publication, the Fifth Circuit denied the Petition for Rehearing. (App. 20)

The Fifth Circuit's refusal to clarify and publish its opinion should not prevent Gonce-Warner from challenging the Fifth Circuit's decision in this case. The Fifth Circuit adopted a standard for establishing a prima facie

case of discrimination in the context of a denial of tenure in *Tanik v. Southern Methodist University*, 116 F.3d 775 (5th Cir. 1997). The same standard was applied in this case and the standard is inconsistent with standards applied by other circuits in tenure denial cases.

## JURISDICTION

The court of appeals entered its judgment on November 26, 2001. The Petition for Review was denied on January 9, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 1 of the Fourteenth Amendment of the United States Constitution provides, in relevant part:

> No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.

Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-2, provides, in relevant part:

> It shall be an unlawful employment practice for an employer –
>
> (1) to . . . discriminate against any individual with respect to his . . . privileges of employment, because of such individual's . . . sex . . . ; and

42 U.S.C. § 2000e-3 provides in relevant part:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this title, or because he has made a charge, testified, assisted or participated in any matter in an investigation, proceeding or hearing under this title [42 U.S.C. §§ 2000e-2000e-17].

## STATEMENT OF THE CASE

In the summer of 1992, Baylor conducted a nationwide search for a new Associate Dean of its Graduate School. Dr. Gonce-Warner[1] was one of thirty applicants who responded to Baylor's advertisement in *The Chronicle of Higher Education*. She was recommended for employment by a committee of the Graduate faculty, who had narrowed the applicant field to five interviewees. She began her employment at Baylor in February of 1993. In addition to being employed as Baylor's Associate Graduate Dean, Gonce-Warner was appointed to a tenure-track position as Associate Professor in Baylor's Museum Studies Department ("Museum Studies").

Baylor renewed Gonce-Warner's administrative/faculty contract for the 1993-94, 1994-95, and 1995-96 academic years, following annual evaluations and recommendations from the Dean of the College of Arts and Sciences and the Graduate School Dean. She applied for tenure during the fall of 1995. Her tenure application was denied in the spring of 1996 and she received a one-year terminal contract for the 1996-97 academic year. She was removed from her position as Associate Graduate Dean on December 13, 1996, but she continued to work in Museum Studies through May of 1997.

She timely filed an EEOC charge and later filed suit alleging that Baylor (1) had discriminated against her because of her sex, in violation of Title VII, when it denied her tenure application and terminated her employment as Associate Graduate Dean and (2) had retaliated against her, in violation of Title VII, by denying her tenure and terminating her employment as Associate

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[1] At the time that Gonce-Warner was first employed at Baylor her surname was Gonce-Winder, as a result of a marriage that had long since been dissolved. Her surname was changed to Gonce-Warner when she remarried in 1994.

Graduate Dean because she had opposed unlawful discrimination and/or had assisted another employee in asserting a complaint based on the gender-hostile working environment in Baylor's Strecker Museum and Museum Studies Department. Gonce-Warner sought reinstatement of her employment and/or recovery of money damages, including economic losses, compensation for personal injuries involving severe psychological and physical illness, and punitive damages.

The District Court granted summary judgment on all of Gonce-Warner's claims, based on Baylor's argument that she could not prove a prima facie case of gender discrimination or retaliation. The Fifth Circuit affirmed the District Court's summary judgment on her gender discrimination claim but did not address her retaliation claim.

## I. Baylor Demographics and Background Facts.[2] *Where have all the Women Gone?*

Gonce-Warner was the first female to be appointed Graduate Dean or Associate Graduate Dean at Baylor. She

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[2] The most detailed statement of relevant facts, from Gonce-Warner's perspective was included in her Affidavit, a copy of which was submitted to the Court of Appeals in Appellant's Record Excerpts at Tab 7. Deposition excerpts that were related to facts in Gonce-Warner's Affidavit were cross-indexed to each Paragraph of her Affidavit in the Appendix to Gonce-Warner's Response to Baylor's Summary Judgment Motion. The following notations are used for referencing the evidentiary record in this Petition:

1. Gonce-Warner's Affidavit is referenced by paragraph number, using "GW Aff., ¶ ___".

2. Deposition excerpts are referenced by the name of the deponent and the page number of the deposition, e.g., "Walbesser, p.___".

3. Deposition exhibits are referenced by the Exhibit No., e.g., "Ex.___".

was responsible for developing and implementing standardized policies and procedures relating to Graduate School functions, i.e., admissions, financial aid, curricula, faculty credentialing, verification of completion of degree requirements, etc. She was also responsible for enforcing the policies to insure that the quality of graduate education was maintained uniformly throughout all Graduate degree programs. Gonce-Warner worked closely with faculty who served as Directors of Graduate Programs. The Directors, in turn, served as liaisons between the Graduate School and the faculty and students in their respective programs. At the time, Baylor had approximately 67 Graduate Programs and 41 faculty members served as Directors. Only three of the Directors were female.

Because the Associate Graduate Dean's position was a 3/4 time position and because a deanship is an academic position, Gonce-Warner also accepted a faculty appointment as Associate Professor, on tenure track, in Baylor's Museum Studies Department. (GW Aff.,¶ 5) She received three years of credit toward tenure for her experience at the University of Maryland, Baltimore Campus, where she had taught for six years in both the Education and Information Systems departments and she had served as the Director of Graduate Programs for Information Systems. (GW Aff.,¶ 8)

The Museum Studies Department ("Museum Studies") was not created by Baylor until 1992, although the university had offered undergraduate courses in museum studies for over a decade. Museum Studies was also scheduled to begin a Master's Program in the Fall of 1993. There were only three other people who held professorial or administrative positions in Museum Studies in 1993. All three were males: Mr. Calvin Smith, Dr. T. Lindsey Baker, and Mr. David Lintz. Mr. Smith ("Smith"), the Chair of the Department, held a Master's Degree in Paleontology and had been employed as the Director of Baylor's Strecker Museum for about ten years. He had also taught undergraduate museum studies classes

as a non-tenure-track Lecturer in the Biology Department. (GW Aff.,¶ 9) When the Department was created in 1992-93, Smith retained his position as Director of the Museum, was promoted to Associate Professor, on tenure track, and was appointed Chair of the department. Mr. Baker ("Baker") had been employed at Baylor since 1990 in a 3/4 staff position as Curator of the Historic Village, which was a part of the Strecker Museum. In 1993, Baker continued to work only 3/4 time, but 1/2 of his time was allocated to his new appointment as an assistant professor, on tenure track, and 1/2 of his time was allocated to administrative duties as the Department's Director of Graduate Programs and Academic Programs. Mr. Lintz ("Lintz") had been employed as the Assistant Director of the Strecker Museum for many years prior to Gonce-Warner's employment. (GW Aff.,¶ 14) Although Lintz' official position was a purely staff position, he had periodically taught laboratory sections for Museum Studies courses.

All of Gonce-Warner's professorial supervisors were male: Mr. Smith, Chair of her academic department; Dr. Bill Cooper, Dean of Baylor's College of Arts and Sciences; Dr. Donald Schmeltekopf, Baylor's Provost and Vice-President of Academic Affairs; and President Herbert H. Reynolds.

All of the supervisors over her administrative position as Associate Dean of the Graduate School were also males: Dr. Henry Walbesser, Dean of the Graduate School; Dr. Schmeltekopf, Provost and VP; and President Reynolds. Dr. Robert Sloan, Jr. became the President of Baylor effective June 1, 1995. Dr. Sloan had previously served as Dean of Baylor's Truett Seminary from 1993-1995.

Because Gonce-Warner had co-authored the formation of both a master's and doctoral program at Maryland, and because none of the other faculty in Museum Studies had administrative experience in the operations of a graduate program, from February 1993 until the Fall of 1993, Gonce-Warner's departmental duties focused on assisting her colleagues in completing all of the Graduate

School requirements for beginning the Master's Program and admitting students into the program for the 1993-94 academic year. She was not scheduled as professor of record for any classes until the Spring of 1994. As it turned out that was the only Museum Studies class that Gonce-Warner formally taught, although she directed Independent Studies and Master's Theses, for which her individual students received grades and credit.

## II. Plaintiff's Claims.

### A. Beginning of Retaliation.
*Mind Your Own Business!*

In September of 1993, at approximately 7:00 a.m., when Gonce-Warner arrived at her Graduate School office, Mary Lou Black, a secretary who had been employed, in July, 1993, in the Strecker Museum (which shared office space with Museum Studies) was sitting outside the office. She looked upset and when Gonce-Warner asked her what was wrong, she began to cry. After they moved into Gonce-Warner's office, Ms. Black began describing a series of events that involved Mr. Lintz. She reported that he was verbally and emotionally abusive to her, demeaned her, and made excessive demands on her and that he was acting the same way toward female student workers, some of whom were leaving the department because of his actions. She stated that his actions were unreasonable, created excessive stress, and interfered with her ability to do her job. She also told Gonce-Warner that she had repeatedly discussed her problems with Smith, who had assured her that he would counsel Lintz, but nothing had happened. She also reported that her family was very concerned about her obvious distress and her husband was threatening to contact an attorney because no one was taking action to eliminate what he considered to be harassment of his wife. She cried hysterically as she described what had happened. (GW Aff.,¶ 16)

Gonce-Warner suggested that Black pursue her complaint with Mr. Claude Ervin, Baylor's Director of Personnel. Gonce-Warner also called Ervin to alert him to the fact that Ms. Black might be coming to see him. She briefly described the meeting, Ms. Black's complaints, and the fact that other female workers were reportedly experiencing similar problems. She specifically asked Ervin to keep the referral confidential because of the difficulty in separating her role as Associate Graduate Dean from her role as a professor in Museum Studies since Ms. Black was employed in the Strecker Museum. (GW Aff.,¶ 18) Gonce-Warner also reported Ms. Black's visit to Dean Walbesser.

Ervin apparently did not keep the referral confidential because, at 7:00 the next morning, Smith "bolted" into Gonce-Warner's Graduate School office and "yelled" at her, saying "Don't you ever refer any person in my department to the Personnel Office without talking to me first." (GW Aff.,¶ 19)

As a result of Ms. Black's complaint and Gonce-Warner's referral to Ervin, Lintz was issued a warning. When other female staff and student workers lodged additional written complaints, Lintz was demoted with a reduction in salary, and was placed on probation for one year, subject to termination if the behavior recurred. Despite the fact that Smith knew that Lintz had been demoted, he continued to refer to him as his "Assistant Director" of Strecker. (GW Aff.,¶ 22)

Provost Schmeltekopf, who was one of Gonce-Warner's supervisors over both her professorial and administrative positions, was also the administrator in charge of the Strecker Museum. Dr. Schmeltekopf and his Assistant Provost, Dr. Tom Charlton, were responsible for overseeing the personnel and operations of the Museum. When Lintz was disciplined in the Fall of 1993, all personnel action forms and other personnel records relating to Lintz' discipline were signed by Smith, Ervin,

Charlton, and Schmeltekopf. Also, in a deposition in a related case, Ervin testified that all "decisions" in the Lintz case were made by "Smith, Charlton, Schmeltekopf and others in the administration." Ervin also testified that he talked to Smith and Charlton on several occasions when matters relating to Lintz were an issue and that he talked to Schmeltekopf on "one or so" occasions. (Ervin, *Salay v. Baylor*, pp.77, 37) Ervin also confirmed that Smith knew that Gonce-Warner had referred Black to Ervin and that Smith told Ervin how he had "reacted to her reporting to Ervin." (Ervin, pp.10-11)

Baylor records produced during discovery revealed that the behavior that offended Ms. Black had been ongoing for at least three and possibly as long as eight years prior to Ms. Black's complaint and that Smith had been aware of the behavior throughout that time. Although Lintz was removed from probation and restored to his prior position in August of 1994, another complaint was lodged against him in June of 1995. Again, Lintz was demoted, but he was not placed on probation or threatened with termination. His salary was also reduced but the reduction was only a temporary one. Baylor records reflected that shortly after Lintz' salary was reduced, Smith, Charlton, and Schmeltekopf made a deal to give Lintz out-of-cycle pay increases every six months until his salary was fully restored to its former level.

**B. Result of Retaliation.**
*Kill the Messenger!*

Smith testified that he initiated efforts – in earnest – to get rid of Gonce-Warner between the Fall of 1993 and the Fall of 1994 (Smith I, pp.61-77), i.e., within a couple of months following the first time that Smith was forced to discipline Lintz.

In September of 1994, Schmeltekopf threatened to get rid of Gonce-Warner. He told Walbesser he had received a lot of complaints about Gonce-Warner and he wanted

Walbesser to set up a meeting of himself, Ervin, Walbesser, and Gonce-Warner to discuss an ultimatum that he proposed be issued to Gonce-Warner, setting forth conditions that she would have to satisfy in order to avoid termination of her employment. Unbeknownst to Gonce-Warner and Walbesser, Smith and Baker had furnished complaint letters to Schmeltekopf, criticizing Gonce-Warner's performance in her faculty position in Museum Studies. Neither Walbesser nor Gonce-Warner were ever furnished copies of the complaints and neither was given an opportunity to respond to the complaints. (GW Aff.,¶ 22; Walbesser I, pp.95-96)

Dean Cooper pointed out to Schmeltekopf that Gonce-Warner had a written contract through the Spring Semester of 1995 and could not be terminated from her faculty position absent a hearing before her peers.

Walbesser agreed to and did solicit evaluations of Gonce-Warner's performance from each of the Directors of Graduate Programs to see if Schmeltekopf's concerns were justified. Of the 20+ evaluations returned, only one was negative. (GW Aff.,¶ 27; Walbesser I, pp.106-111, 166-169, III, pp.22-23, Ex. 145) He also instituted a poll of graduate students that asked for feedback regarding interactions with Gonce-Warner and other Graduate School staff and about 95% of the comments about Gonce-Warner were positive. (Walbesser I, pp.107-108)

**C. Evidence of Discrimination.**
*Don't Speak With Authority!*

Cooper and Walbesser also agreed to meet with Gonce-Warner for a counseling session relating to the complaints that Schmeltekopf had generally described, without furnishing copies. In October, 1994, Walbesser and Cooper met with Gonce-Warner, who described the counseling session as:

> " . . . focused on (1) how my actions were perceived by others – particularly in view of the

> fact that I was a 'woman in a man's world,' (2) how my cultural background contributed to the perception of others, (3) and how I might adapt my administrative and professional style to conform to the culture of Baylor, as well as to improve my relationship within the male-dominant situation in which I was working. . . . " (GW Aff.,¶ 26)

Walbesser similarly characterized the meeting as "an explanation of the acculturation of a woman in an administrative position at Baylor." He recalled that Gonce-Warner said she believed that people had a problem with her because she was a "female – charged with responsibility" and that Cooper acknowledged that Baylor "was a male-oriented culture." (Walbesser I, pp.103-104, II, pp.80-82, III, p.32-33; Gonce-Warner, pp.66-67)

During the tenure process, three of Gonce-Warner's peer reviewers noted that Gonce-Warner's sex and/or competence might present problems for her. Specifically, under interpersonal relationships, Michael Korpi noted:

> "Dr. Gonce-Warner has only a moderate level of tolerance for incompetence. On several occasions I have heard people try to cover for their own failure or inadequacy by making sexist comments about Dr. Gonce-Warner. This is highly offensive. In all cases, Dr. Gonce-Warner exhibited much more patience than I would have. She exhibits good judgment and has dealt fairly with both students and faculty." (Ex. 58)

In his deposition, Dr. Korpi stated that all of the sexist comments that he recalled had come from men. The comments he recalled included "witch", "bitch", "Here she comes on her broom", etc. Mr. Smith, Gonce-Warner's department chair also admitted referring to her as a "bitch."

Also in comments under the category of "interpersonal relationships," another reviewer, Dr. Bill Bellinger, stated:

> "My relationship with Dr. Gonce-Warner has always been cordial. . . . Some find her too direct. Her personal style is different from the 'Southern gracious' style typical of Baylor's heritage. . . . She could relax a bit in terms of style, but I appreciate the fact that she gets her job done." (Ex. 58)

Finally, also under "interpersonal relationships", Dr. Nancy Goodloe also noted that Gonce-Warner might not be received well by some at Baylor, saying:

> "I would give Dr. Gonce-Warner high marks in this category. These would reflect my experience with her. She is extremely capable, well-organized, confident, and assured of her abilities. Not everyone at Baylor handles these qualities well when they are displayed by a woman, and I know she has had some problems with some people." (Ex. 58)

**D. Evidence of Retaliation/Discrimination?**
*Watch Your Backside!*

Even though Schmeltekopf backed away from his threat in the fall of 1994, during that time period Ervin told Walbesser that Gonce-Warner "was going to be gone and [he] needed to understand that." When Walbesser asked why, Ervin said "Well, you know, that clearly people want her out." (Walbesser I, pp.106-111, 141, 130, 165-169; II, p.16, 94-96, 119-125, III, pp.22-24.)

**E. Tenure Review Process.**
*Playing by the Rules?*

In the Fall of 1995 and Spring of 1996, Provost Schmeltekopf actively participated in the decision to deny Gonce-Warner's application for tenure. In December of 1996, Provost Schmeltekopf delivered his letter terminating Gonce-Warner's employment as Associate Graduate Dean.

Baylor's tenure policy required that the performance of professors on tenure track be evaluated annually by the Department Chair and the Dean of the College of Arts & Sciences. If the reviews were satisfactory, the tenure-track contract was renewed annually pending application and evaluation for tenure; if not satisfactory, the professor was issued a terminal contract. Gonce-Warner's annual pre-tenure reviews were conducted in November of 1993, and November of 1994.

In November of 1994, when Cooper conducted his annual contract review, Smith did not express any concerns even though, unbeknownst to Gonce-Warner, Smith (and Baker) had already submitted written complaints to Schmeltekopf in September of 1994. (GW Aff.,¶ 27) Although Baylor's policies required that the Chair furnish a written performance review, Smith never furnished one to Gonce-Warner. Cooper recommended renewal of Gonce-Warner's annual contract and President Reynolds approved the renewal, as he had in 1993.

In the Fall of 1995, Gonce-Warner and Smith were both scheduled to go through the tenure application and review process. (GW Aff.,¶ 28) Gonce-Warner was denied tenure but Smith was granted tenure.

Ordinarily a candidate for tenure is first evaluated by tenured faculty in his or her academic department because they are expected to have personal knowledge of the candidate's teaching, scholarship, service, and interpersonal relations since they have worked most closely with him or her. The tenured faculty in any department are also considered to be the most knowledgeable in their academic discipline. The tenured faculty in the candidate's department are called "peer faculty" and their peer faculty evaluations and recommendations are submitted with the candidate's dossier to the University Tenure Committee. The University Tenure Committee then reviews both the professor's dossier and all peer faculty recommendations before making its recommendation to

the Provost and the President as to whether or not tenure should be granted to the candidate. (GW Aff.,¶ 28) In the cases of Gonce-Warner and Smith, the traditional review by tenured departmental colleagues was impossible because there were no tenured faculty in Museum Studies. Cooper suggested, and Gonce-Warner agreed, that her peer review committee would be created by appointing five tenured faculty from other departments within the College of Arts and Sciences or the School of Education to serve as the peer reviewers who would make recommendations to the University Tenure Committee. Gonce-Warner was told that a similar inter-departmental committee would be selected to complete the peer review for Smith, but Walbesser, Cooper, Schmeltekopf and Smith all testified that they did not know how Smith's committee was selected.

An integral part of Gonce-Warner's agreement with Cooper was that all persons selected as peer reviewers would have to have prior experience interacting with her in a professional capacity in the university and would also have to have personal knowledge of her work.

The university did not follow the agreed rules when it appointed Gonce-Warner's tenure committee. One of the persons who was appointed to serve on her peer review committee was a person who had not worked professionally with her and who had no personal knowledge of her work – Dr. Ben Pierce. No Baylor official accepted responsibility for the appointment of Dr. Pierce, but the evidence below supports a reasonable inference that Schmeltekopf's office was the point at which the rules changed:

> Cooper drafted a Memo in June of 1996, after Gonce-Warner's tenure had been denied. (Ex.53) The Memo memorialized the factors that were agreed upon and the procedure that was used to select Gonce-Warner's peer reviewers. It stated that Gonce-Warner's five reviewers were

selected through a consensus of Cooper, Walbesser and Schmeltekopf. Walbesser testified that he and Cooper first considered a list of six reviewers, but one was removed by Cooper, and he understood that Cooper was responsible for submitting the list of reviewers to Schmeltekopf who had final authority for approving the list. According to Walbesser, the final five reviewers on the Walbesser-Cooper list were: Dr. Corey Carbonara, Vice-President and Professor of Communication Studies, Dr. Michael Korpi, Professor of Communication Studies, Dr. Bill Bellinger, Professor of Religion, Dr. Nancy Goodloe, School of Education, Department of Health, Human Performance and Recreation, and Dr. Ken Wilkins, Department of Biology. (Walbesser I.,pp.114-117, II,pp.26,72-74) All of these five reviewers had worked professionally with Gonce-Warner and were familiar with her work.[3] Cooper testified that Walbesser

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[3] Drs. Carbonara and Korpi had worked closely with Gonce-Warner to develop a Multimedia presentation related to computer kiosk design entitled "Inside Museums." Dr. Carbonara had also personally observed Gonce-Warner's teaching effectiveness in the classroom. Dr. Bellinger was the Director of Graduate Studies in the Religion Department, and had interacted with Gonce Warner in that capacity; he had also observed orientation programs that she made to graduate students in the Religion Department from time to time. Dr. Nancy Goodloe and Gonce-Warner had jointly prepared and presented papers at conferences related to Dr. Goodloe's field; and she was also the Director of Graduate Studies in her department. Dr. Ken Wilkins was the best qualified to evaluate Gonce-Warner's qualifications and expertise as they related to the museum studies program. He was listed as an Adjunct Professor in the Undergraduate Catalog of the Museum Studies Department throughout the time that Gonce-Warner was employed at Baylor. He had consulted on projects conducted by the Strecker Museum in the past and he had worked with

designated "Dr. Ben Pierce," as one of the five final reviewers. (Cooper, pp.25-29) Walbesser adamantly denied appointing Ben Pierce. Moreover, Dr. Wilkins testified that he remembered being called and asked to serve as a reviewer on **Gonce-Warner's** peer review committee, that he remembered that he agreed to serve, that he believed the call came from the Arts & Sciences office, that he remained ready and willing to serve, but he never received any evaluation packet for participating in the review and he never found out why he was left out of the review process. (Wilkins, pp.27-29, R.827) Wilkins did serve as a peer reviewer for Smith, and he could have served as a reviewer for both Smith and Gonce-Warner. (Wilkins, p.29) Wilkins also testified that he was "surprised" that Gonce-Warner was denied tenure at Baylor and that he had considered Gonce-Warner to be competent, business-like, well-organized, helpful, and prompt, based on his own personal knowledge. (Wilkins, pp.50; 46-27)

Gonce-Warner did not know Pierce and had never worked with him.

Pierce admitted that he was not at all familiar with Gonce-Warner or her work and had not had any contact with her except for one telephone conversation that Gonce-Warner recalled as very unpleasant. (GW Aff.,¶ 31; Pierce, pp.16-17, 25-27, 33-34) The conversation occurred shortly before she was notified that Pierce was going to be appointed as one of her peer reviewers. Cooper knew that Pierce did not meet the requirements of the agreement with Gonce-Warner because Pierce told him that the

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Gonce-Warner to produce one of the educational units that was incorporated into her multimedia presentation "Inside Museums."

only interaction he had with Gonce-Warner was a telephone conversation and that he might not be in the best position to evaluate Gonce-Warner in view of the conversation he recently had with her (Pierce, pp.27-28). Nonetheless, Pierce served as a reviewer and he was the only reviewer who recommended against granting tenure to Gonce-Warner.

Instead of focusing on Gonce-Warner's tenure dossier, Pierce based his review and recommendation on information that he gathered by interviewing Smith and Baker, who could not otherwise have served as Gonce-Warner's peer reviewers. Smith also gave Pierce copies of the complaint letters that Smith and Baker had sent to Schmeltekopf in the Fall of 1994, when Schmeltekopf was threatening to terminate Gonce-Warner's employment. Pierce accepted all information furnished by Smith and Baker as true and regurgitated it to the University Tenure Committee ("UTC") as support for his evaluation and recommendation not to grant tenure to Gonce-Warner. Pierce recognized that Gonce-Warner's tenure dossier contradicted his recommendation because, as he said, the dossier suggested that Gonce-Warner "was an effective teacher" and that she exhibited scholarship in the areas of "education and information systems" that was "average for Baylor." Nonetheless, he rated her teaching as only "marginal" and her scholarship as "unacceptable" because of the information he gathered from Smith and Baker. Smith and Baker had severely criticized Gonce-Warner's teaching, even though they had not observed her teaching. Furthermore, Smith and Baker told Pierce that Gonce-Warner had been "forced" on the Museum Studies Department, that they had not recruited her, that the most important qualification for faculty in museum studies was experience working in a museum setting, and that according to their criteria, Gonce-Warner had no academic qualification, scholarship, or professional performance in the field of Museum Studies. All of this

information was false and could have been rebutted with undisputed documentation if Gonce-Warner had known that she was being sabotaged. Pierce said he "trusted" Smith and Baker's judgment and therefore relied on their information in rating Gonce-Warner. (Ex. 2) Although Cooper opined that Pierce's evaluation was conducted in an unbiased and proper manner, the other tenured faculty who rated Gonce-Warner found Pierce's evaluation to be exceptionally unusual. The UTC first recommended that Gonce-Warner's tenure be denied outright, but the committee reassessed their position later and, by a majority vote, the UTC recommended that her tenure review be deferred for a year. The rationale given for the decision was based solely on Pierce's review, based on Smith and Baker's input, i.e., Gonce-Warner had not met her burden of proof to obtain tenure "in the field of museum studies" but the majority of the UTC was willing to give her additional time to enhance her credentials "in this area." (Ex. 12)

Baylor's President, in consultation with Provost Schmeltekopf, rejected the recommendation of the UTC, denied Gonce-Warner's tenure application, and notified Gonce-Warner that she would be receiving a one-year terminal contract that would end on the date of spring commencement in 1997. The UTC also recommended a delay of one year for another candidate, a male. The President also rejected that recommendation; however, the candidate was not given a terminal contract but was instead retained on Baylor's teaching faculty as a full-time Instructor and he is still teaching at Baylor.

During the time that Schmeltekopf and Sloan were pondering Gonce-Warner's tenure decision, Schmeltekopf solicited additional materials from Smith to support a decision to reject the tenure committee's recommendation to defer a tenure decision for one year. (GW Aff.,¶ 36; Ex. 66, 67, 68, 69, 70, 71)

Gonce-Warner tried to appeal the decision and she requested the UTC to furnish the information upon which the decision was made, but Baylor denied her access to any of the tenure review material and did not provide an avenue for appeal. Gonce-Warner did receive a letter signed by the Chair of the UTC, Dr. Sandra Genrich, advising her that there were deficiencies in her teaching effectiveness, scholarship, and interpersonal relations; however, Genrich testified that she did not prepare the letter, that she did not furnish the information that was included in the letter, and as far as she knew the tenure committee did not furnish the information that was contained in the letter; instead, the letter was prepared by Baylor's attorney, Charles Beckenhauer (Genrich, p.49). Genrich confirmed that one of the major concerns of the committee was that Gonce-Warner did not have "experience in museum studies" and that she didn't know whether or not the committee knew that museum studies was an interdisciplinary program because she did not recall any discussion about that issue. (Genrich, p.52) Genrich also testified that she was not aware of any process whereby a candidate could find out whether or not any misrepresentations had been made to the UTC and whether the candidate had any avenue to correct any misrepresentations. (Genrich, p.52). Genrich summarized the feeling or "rationale" of the UTC as follows:

> The rationale for that was – that as a whole the comments were that this was a very unfortunate situation, that there had been inadequate time to demonstrate, or it appeared as though there had been inadequate time to demonstrate the teaching effectiveness and the publications with that three-year time frame granted. . . .
>
> And because it seemed as though the potential was – it was not a situation where there was a lack of capability but, rather, a lack of time to demonstrate at Baylor the teaching effectiveness and for several reasons that we – that's why we

made that recommendation." (Genrich, pp.54-55).

During Genrich's deposition, Gonce-Warner also learned that the UTC had totally disregarded a very important part of her tenure dossier – a videotape that would have shown that she did have significant expertise related to museum studies. One of the reasons that Gonce-Warner had accepted a faculty appointment in Museum Studies was because she had expertise in developing educational curricula for use in museums and she also had technological expertise related to computer kiosk design that could deliver educational material in a very exciting format. Because Baylor was in the process of collecting gifts to endow the construction of a new Strecker Museum, Gonce-Warner felt the museum should use state of the art technology in its educational programs for visitors. Therefore, she had spent literally thousands of hours developing a multimedia interactive presentation related to computer kiosk design entitled "Inside Museums." Dr. Wilkins had worked with Gonce-Warner to produce one of the educational units that was incorporated into the presentation. She had duplicated the presentation onto a videotape that was delivered as a part of her tenure dossier to show how her expertise was related to museum studies. Dr. Korpi, who had also worked with Gonce-Warner on this project, stated in his peer review evaluation that:

> "Dr. Gonce-Warner's work on implementing new multimedia technologies is both innovative and excellent. This type of work has much broader impact than publishing the typical journal article and should be encouraged."

Apparently Smith and Baker did not tell Pierce about Gonce-Warner's multimedia project and he was unaware of the existence of "Inside Museums" even though it was part of Gonce-Warner's tenure dossier that was available for his inspection. Genrich confirmed that the UTC did not have access to a video machine to play the videotape

of the multimedia project that Gonce-Warner had submitted as a creative/scholarly work in support of her tenure application; and Genrich concluded that "it was fair to say" that the committee did not review the video. (Genrich, p.14)

**F. Evidence of Retaliation/Discrimination.**
*Don't make that mistake again!*

Within one month after Gonce-Warner was denied tenure, Baylor offered a tenure track contract to Dr. David Salay. Like Gonce-Warner, Dr. Salay had the highest terminal degree, a Ph.D. Like Gonce-Warner, his employment would be divided between a staff position as Director of Operations of the Strecker Museum (50%) and a faculty position as an Assistant Professor on tenure track (50%). Like Gonce-Warner, he was experienced in supervising master's theses, serving on doctoral committees, and directing independent studies, practicums, etc. Like Gonce-Warner, he served as the Museum Studies liaison to the Graduate School and he worked on the Museum Studies graduate curriculum committee, revising the curriculum and getting approval from the Graduate School. Like Gonce-Warner, he had once been a public school teacher and he was skilled in the field of Museum Education. Unlike Gonce-Warner, he was a male. (Salay, pp.31, 150, 161, 160, 131-132, 190)

Baylor also appointed a male to replace Gonce-Warner as Associate Graduate Dean – Dr. Ken Wilkins.

## III. Proceedings Before the District Court

Since this Petition is limited to the question of the standard for establishing a prima facie case of sex discrimination and or retaliation in a case involving denial of tenure, Gonce-Warner's removal as Associate Graduate Dean will not be addressed.

Thus, the proceedings before the District Court involved basically three issues: (1) Did Gonce-Warner

timely file her EEOC complaint? (2) Could Gonce-Warner establish a prima facie case of discrimination in the context of the denial of tenure? and (3) Could Gonce-Warner establish a prima facie case of retaliation in the context of the denial of tenure? The Court answered these questions (1) Yes, (2) No, and (3) No. Without an in depth analysis of the facts, other than the facts strictly related to the tenure process, the District Court relied on the standard set forth in *Tanik v. Southern Methodist University*, 116 F.3d 775, 776 (5th Cir. 1997), holding that "To establish a prima facie case in the context of a denial of tenure, the plaintiff must show that: (1) she belongs to a protected group, (2) she was qualified for tenure, and (3) she was denied tenure in circumstances permitting an interference [sic] of discrimination." The District Court also properly noted that the Fifth Circuit's standard was adopted from *Zahorik v. Cornell University*, 729 F.2d 85 (2d Cir. 1984). The court concluded that (1) Gonce-Warner had failed to meet her burden to prove that she was qualified for tenure, and, alternatively, (2) she had failed to meet her burden to prove that she was denied tenure under circumstances permitting an interference [sic] of discrimination. The Court then gratuitously held that the fact that Baylor's President Sloan granted tenure to nine other female candidates was sufficient evidence to dispel any inference of gender bias in his decision to deny Gonce-Warner's tenure application. (App. 10-12)

In its analysis of Gonce-Warner's claim that her tenure denial was precipitated by retaliation, the Court held that Gonce-Warner's referral of Ms. Black to Baylor's Personnel Officer could not constitute "opposition" under Title VII's anti-retaliation provision, 42 U.S.C. § 2000e-3. The court alternatively held that Gonce-Warner failed to produce any evidence that indicated that the UTC, Dr. Sloan, or Dr. Schmeltekopf were aware of these instances of alleged opposition when they made their employment decisions concerning Warner.

The District Court made a clear distinction between the standard necessary to establish a prima facie case in the context of tenure denial versus "other employment decisions," noting that for "other employment decisions, the plaintiff must show that: (1) she belongs to a protected group, (2) she was qualified for the position in question, (3) the employer made an adverse employment decision despite the plaintiff's qualifications, and (4) the plaintiff was replaced with a person not within the protected class," citing *Portis v. First National Bank*, 34 F.3d 325, 328 n.5 (5th Cir. 1994). (App. 11)

Petitioner contends that there need not be any difference between the standard for establishing a prima facie case of discrimination in the context of a tenure denial, and the standard for establishing a prima facie case of discrimination in the context of any other employment decision. The District Court justified the distinction by reiterating the rhetoric of *Zahorik* concluding that "tenure decisions" are somehow "set apart" from employment decisions "generally." If so, then employees who are deprived of their right to tenure are being held to a different standard than employees that are deprived of "other employment opportunities." The District Court also justified the disparate treatment of a tenure decision versus "any other employment decision" by stating that a Court is "not in the best position to determine whether a well-educated individual should be entitled to a continuing expectation of employment" and the employer is "best able to determine the qualifications for tenure." The issue before the court was not "who" the employer decided was the best person for the job, but the issue was whether or not the applicants for tenure were treated equally in the review process or was Gonce-Warner treated differently because of her sex or because she had engaged in activity protected by the anti-retaliation provision of Title VII. By focusing on the wrong issue,

federal courts have deprived university faculty from equal treatment under Title VII.

### IV. The Decision of the Court of Appeals

The Fifth Circuit held that "The district court correctly determined that the plaintiff produced no summary judgment evidence from which an inference could be drawn that the reason given for the denial of tenure was a pretext for sexual discrimination." The only sex discrimination issue that Baylor raised in the District Court, as stated in its opinion, was the issue of whether or not Gonce-Warner established a prima facie case of sex discrimination in the context of Baylor's tenure denial. Because Baylor's Motion for Summary Judgment in the trial court related solely to Gonce-Warner's ability to establish a prima facie case, this court must conclude that the "pretext" language in the Fifth Circuit's opinion relates to the third prong of the standard that was adopted by the Fifth Circuit in *Tanik*, cited supra, i.e., whether Gonce-Warner "was denied tenure in circumstances permitting an inference of discrimination."

## REASONS FOR GRANTING THE PETITION

### I. Title VII's Failure to Protect Women Faculty

Over ten years ago, this Court noted:

> "When Title VII was enacted originally in 1964, it exempted an 'educational institution with respect to the employment of individuals to perform work connected with the educational activities of such institution.' . . . Eight years later, Congress eliminated that specific exemption by enacting § 3 of the Equal Employment Opportunity Act of 1972. . . . This extension of Title VII was Congress' considered response to the widespread and compelling problem of invidious discrimination in educational institutions. The

> House Report focused specifically on discrimination in higher education, including the lack of access for women and minorities to high ranking (i.e., tenured) academic positions. . . . Significantly, opponents of the extension claimed that enforcement of Title VII would weaken institutions of higher education by interfering with decisions to hire and promote faculty members." (*U. of Penn. v. E.E.O.C.*, 493 U.S. 182, 190 (1990).)

The effect of the elimination of this exemption was supposed to expose tenure determinations to the same enforcement procedures applicable to other employment decisions, but what can EEOC or any individual litigant do today if the federal courts continue to treat tenure decisions as separate from and more removed from scrutiny than "other employment decisions" as stated in *Tanik v. Southern Methodist University* and in *Zahorik v. Cornell*.

Women's share of the Ph.D.'s earned by U.S. citizens has increased from 25% to 44% between 1976 and 1991; but the women's share of tenured and tenure track faculty positions in universities has increased by only 8% – from 22% in 1972 to 30% in 1992. At this slow pace, women will not achieve equity in university faculty positions until the year 2044. In 1975, 46% of full-time female faculty in universities were tenured. In 1992, the percentage of women tenured was still 46%. At the same time, men have increased their share of the tenure pie from 64% in 1975 to 71% in 1992. Women's salaries have also stagnated. In 1982, female full professors were earning 89% of the salary earned by their male counterparts. In 1992, females earned 88.2% of men's salaries. *See* Martha S. West, *Gender Bias in Academic Robes; The Law's Failure to Protect Women Faculty*, 67 Temp.L.Rev. 67 (1994). Why has there been no progress? One significant reason is that Title VII enforcement remedies are not applied equally to

women and other underrepresented groups on university faculties. Historically, plaintiffs have been pitifully unsuccessful in contesting employment decisions by colleges and universities, with employers winning 80% of the time and the employee prevailing only 20% of the time – often purely because of the reluctance of federal court to impose limits on the employment practices of the academe equivalent to the limits imposed on other institutions.

Title VII is supposed to provide the legal mechanism for elimination of discriminatory barriers in employment – including barriers like the so-called "glass-ceiling" – the term used to describe the transparent promotion barrier that prevents qualified women from reaching the highest levels in their profession. Typically, advancement to positions beyond the glass-ceiling depends largely on subjective factors such as leadership abilities and interpersonal skills. Research demonstrates that problems may arise for women aspiring to these high-level positions because both male and female evaluators have a tendency to rate women candidates negatively, solely because of their gender – impermissible gender stereotyping. *See* Diane L. Bridge, *The Glass Ceiling and Sexual Stereotyping: Historical and Legal Perspectives of Women in the Workplace*, 4 Va.J.Soc.Pol'y & L. 581. For example, when evaluators are asked to rate a male candidate on his ambition he may be rated as "up and coming" but an equally ambitious woman may be deemed to be "pushy" or "abrasive." *Id.*, at 602. In this case, when Baylor's Deans "counseled" Gonce-Warner in order to assist her in "acculturating" to Baylor, she was actually being advised to adjust her behavior to compensate for gender stereotyping in Baylor's male-dominant environment. "According to current sex stereotypes, men are believed to be competent, rational, assertive, independent, objective and self confident," while women are supposed to be "emotional, submissive, dependent, tactful, and gentle." *Id.*, at 604.

"Women who deviate from these traditional stereotypes are viewed as displaying inappropriate masculine behavior and are labeled abrasive or maladjusted." *Id.*, at 607-608. Even though sex stereotyping has been validated by extensive research in the scientific community for more than five decades, and even though Baylor's Deans, by their action, recognized that sex stereotyping was affecting the perception of Gonce-Warner's suitability for employment as Associate Graduate Dean, the federal courts held that there was no evidence to support her claim that Baylor's adverse employment action was related to gender bias.

## II. The Importance of Uniform Standards of Proof

### A. The Fifth Circuit

The Fifth Circuit had adopted different standards for establishing a prima facie case in university tenure cases vs. "other employment actions." (App. 11) For university tenure cases the standard requires proof that (1) she belongs to a protected groups, (2) she was qualified for tenure, and (3) she was denied tenure in circumstances permitting an inference of discrimination. *Tanik v. Southern Methodist University.* For "other employment actions" the standard requires proof that (1) she belongs to a protected group, (2) she was qualified for the position in question, (3) the employer made an adverse employment decision despite the plaintiff's qualifications, and (4) the plaintiff was replaced with a person not with the protected class. *Portis v. First National Bank of New Albany, MS*, 34 F.3d 325, 328 n.6 (5th Cir. 1994). Although the District Court decided that Gonce-Warner had failed to meet two prongs of the *Tanik* standard, i.e., that she was qualified and that there were circumstances permitting an inference of discrimination, the Fifth Circuit did not cite Gonce-Warner's qualifications as being deficient. Thus,

had the Fifth Circuit applied the *Portis* standard rather than the *Tanik* standard for establishing a prima facie case, Baylor's Motion for Summary Judgment should have been denied because Gonce-Warner was replaced by a male.

In *Tanik*, the Fifth Circuit stated that to prove a prima facie case, the plaintiff "may" be able to show "departures from procedural regularity", "conventional evidence of bias" on the part of individuals involved, **or** that the plaintiff is found to be qualified for tenure by "some significant portion of the departmental faculty, referrants, or other scholars in the particular field." *Tanik*, at 776. Gonce-Warner clearly presented some (1) evidence that showed that Baylor departed from the procedure that it had agreed to use in reviewing her tenure, i.e., by appointing Pierce to her committee when he did not meet the qualifications that were stated for her peer reviewers, but it did not depart from that procedure in Smith's tenure evaluation, (2) evidence that showed that other faculty serving on the peer review panel found Pierce's method of conducting his review, i.e., relying on interviews of non-tenured faculty, to be a significant departure from traditional tenure review procedures, and (3) evidence that four of her five reviewers found her to be very well qualified for tenure at Baylor and even the fifth reviewer, Pierce, admitted that she would be qualified if he based his evaluation on her tenure dossier rather than on the self-serving statements of Smith and Baker. Nonetheless, the courts below held that Gonce-Warner did not present any evidence to establish a prima facie case.

The *Tanik* standard is clearly more onerous than the *Portis* standard.

### B. The Other Circuits

The Second, Fifth, and Eighth Circuits apply the *Zahorik/Tanik* standards to prove a prima facie case of discrimination in tenure denial cases. *See Brousard-Norcross v. The Augustana College Association*, 935 F.2d 974, 976

(8th Cir. 1991). On the other hand, the First Circuit applies a standard more akin to the Fifth Circuit's standard set forth in *Portis* for "other employment actions," requiring that (1) plaintiff be a member of a protected class, (2) that plaintiff was a candidate for tenure and was qualified for tenure under university standards, (3) that she was qualified for tenure, and (4) that tenure positions were open and that others were granted tenure in the department during a period relatively near to the time plaintiff was denied. *See Banerjee v. Board of Trustees of Smith College*, 648 F.2d 61, 62 (1st Cir. 1981) *cert. denied* 454 U.S. 1098, 102 S.Ct. 671, 70 L.Ed.2d 639 (1981); *Brown v. Trustees of Boston University*, 891 F.2d 337 (1st Cir. 1989). In order to be "qualified" she "need only show that she was sufficiently qualified to be among those persons from whom a selection, to some extent discretionary, would be made." *Fields v. Clark University*, 966 F.2d 49, 53 (1st Cir. 1992).

The standard adopted by the First Circuit is much more akin to the standard uniformly and routinely applied in non-tenure employment actions litigated under Title VII, thereby affording university faculty the same protection extended to other litigants challenging adverse employment actions.

## CONCLUSION

There is clearly a split between Circuit Courts of Appeals regarding the standard to be applied for establishing a prima facie case of discrimination within the context of university tenure decisions. When Congress removed the exemption afforded to educational institutions under Title VII, as originally adopted in 1964, it intended for Title VII to be applied to employees of educational institutions in the same manner it is applied to other employers. This court has recognized that the effect of Congress' elimination of the exemption was "to

expose tenure determinations to the same enforcement procedures applicable to other employment decisions." *University of Pennsylvania v. Equal Employment Opportunity Commission*, 493 U.S. 182, 190, 110 S.Ct. 577, 107 L.Ed.2d 571 (1990). Litigation is an important part of Title VII enforcement and this Court should enforce a standard of proof that is consistent for all Title VII litigants, including those challenging tenure determinations.

Respectfully submitted,

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*Attorneys for Petitioners*

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

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No. 00-51235

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DR. CHERYL GONCE-WARNER

Plaintiff-Appellant-Cross-Appellee

VERSUS

BAYLOR UNIVERSITY

Defendant-Appellee-Cross-Appellant

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Appeals from the United States District Court
For the Western District of Texas, Waco
W-98-CV-356

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November 26, 2001

Before KING, Chief Judge, DAVIS and MAGILL,* Circuit Judges.

PER CURIAM:**

After reviewing the record and considering the briefs and arguments of the parties, we are persuaded that the district court correctly granted summary judgment in favor of the defendant. The district court correctly determined that the plaintiff produced no summary judgment

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* Circuit Judge of the 8th Circuit, sitting by designation.

** Pursuant to 5th Cir. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

evidence from which an inference could be drawn that the reason given for the denial of tenure was a pretext for sexual discrimination.

**AFFIRMED.**

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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No. 00-51235

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D.C. Docket No. W-98-CV-356

CHERYL GONCE-WARNER, DR

Plaintiff-Appellant-Cross-Appellee

v.

BAYLOR UNIVERSITY

Defendant-Appellee-Cross-Appellant

Appeals from the United States District Court
for the Western District of Texas, Waco

Before KING, Chief Judge, DAVIS and MAGILL,* Circuit Judges.

JUDGMENT

This cause was considered on the record on appeal and was argued by counsel.

It is ordered and adjudged that the judgment of the District Court is affirmed.

IT IS FURTHER ORDERED that plaintiff-appellant cross-appellee pay to defendant-appellee cross-appellant the costs on appeal to be taxed by the Clerk of this Court.

ISSUED AS MANDATE: JAN 17 2002

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* Circuit Judge of the 8th Circuit, sitting by designation.

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE WESTERN DISTRICT OF TEXAS**
**WACO DIVISION**

| | | |
|---|---|---|
| **DR. CHERYL GONCE-WARNER,** | § | |
| | § | |
| **Plaintiff,** | § | **CIVIL ACTION** |
| **v.** | § | **W-98-CA-356** |
| **BAYLOR UNIVERSITY,** | § | |
| | § | |
| **Defendant.** | § | |

## MEMORANDUM OPINION AND ORDER

This is an action alleging discrimination and retaliation in violation of Title VII of the Civil Rights Act of 1964 ("Title VII"). The Plaintiff, Dr. Cheryl Gonce-Warner ("Warner"), was employed as a professor in the Museum Studies Department at Baylor University ("Baylor"), the Defendant. Warner, in addition to her position as a professor at the university, also served as an Associate Dean of Graduate Studies. Warner was denied tenure by Baylor in April 1996 and was relieved of her duties as Associate Dean in December 1996. Warner filed this Title VII claim alleging that Baylor discriminated and retaliated against her when it made its employment decisions.

Before the Court is Baylor's Motion for Summary Judgment. The Defendant's motion is based on five grounds. First, that the Plaintiff's tenure denial charge was not timely filed. Second, that the Plaintiff alleged additional retaliation charges beyond those listed in the administrative filing made to the Equal Employment Opportunity Commission ("EEOC"). Third, that the

Plaintiff alleged events that took place more than 300 days before the administrative filing made with the EEOC. Fourth, that the Plaintiff cannot make out a prima facie case of gender discrimination under Title VII. Finally, that the Plaintiff cannot make out a prima facie case of retaliation. In her Response to the Defendant's motion, the Plaintiff conceded that the additional retaliation claims alleged in her complaint exceed the scope of the administrative filing. Additionally, the Plaintiff conceded that she alleged events that took place outside of the 300 day period prior to her administrative filing made to the EEOC. Because of these concessions, the Defendant's Motion for Summary Judgment will be **GRANTED** on these two grounds without additional discussion.

The Court, having carefully considered the arguments on the three remaining grounds for summary judgment presented in Defendant's motion and the response of the Plaintiff, finds Defendant's Motion for Summary Judgment will be **GRANTED IN PART** and **DENIED IN PART.**

## I. Background Facts

Warner was hired by Baylor in February 1993. Warner held two positions at Baylor. Three-quarters of her responsibilities came from her position as Associate Dean of the Graduate School and one-quarter of her responsibilities came from her position as Associate Professor, a tenure-track position in the Department of Museum Studies. Warner was denied tenure as Associate Professor on April 4, 1996 and was further informed that her professional appointment would be terminated at the

end of the spring semester of 1997. Likewise, Warner was removed from her position as Associate Dean on December 13, 1996.

## II. Summary Judgment

The purpose of summary judgment is to piece the pleadings and assess the proof to determine if a genuine need for trial exists. *Matsushita Elec. Indus., Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). Summary judgment procedure isolates and disposes of factually unsupported claims or defenses, assisting courts in the just, speedy and inexpensive determination of every action. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-324 (1986).

Summary judgment is appropriate only if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c); *Celotex*, 477 U.S. at 322 (1986). A dispute is genuine if the issue could be resolved in favor of either party. *Matsushita*, 475 U.S. at 586; *Thurman v. Sears, Roebuck & Co.*, 952 F.2d 128, 131 (5th Cir.), *cert. denied*, 506 U.S. 845 (1992). A fact is material if it might reasonably affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Matter of Gleusman*, 933 F.2d 1277, 1281 (6th Cir. 1991). The party seeking summary judgment bears an "exacting burden of demonstrating that there is no actual dispute as to any material fact in the case." *Impossible Electronics Techniques, Inc. v. Wackenhut Protective Systems, Inc.*, 669 F.2d 1026, 1031 (5th Cir. 1982).

In determining whether the movant has met its burden, the Court must view the evidence introduced and all

factual inferences from the evidence in the light most favorable to the party opposing summary judgment. *See id.* at 1031. All reasonable doubts as to the existence of a genuine issue of material fact must be resolved against the movant. *See id.* at 1031; *Jones v. Western Geophysical Co.*, 669 F.2d 280, 283 (5th Cir. 1982). The fact that it appears to the Court that the non-movant party is unlikely to prevail at trial or that the movant's statement of facts appears more plausible is not a reason to grant summary judgment. *Id.* at 283.

Once the movant has shown the absence of material factual issues, the opposing party has a duty to respond with any factual assertion that would preclude summary judgment. *See Cleckner v. Republic Van & Storage Co.*, 556 F.2d 766, 771 (5th Cir. 1977). Rule 56(e) of the Federal Rules of Civil Procedure provides that "[w]hen a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him." In this respect, the burden on the non-moving party is not especially heavy; however, he must show specific facts that present a genuine issue of material fact worthy of trial rather than showing mere general allegations. *See Gossett v. Du-Ra-Kel Corp.*, 569 F.2d 869, 872 (5th Cir. 1978).

### III. Administrative Filing Deadline

In order to initiate a lawsuit complaining of discrimination or retaliation under Title VII, the plaintiff must exhaust her administrative remedies by timely filing a charge with the EEOC. The law is well settled that a complainant has 180 days after the last occurrence of the alleged discriminatory practice to file the charge with the EEOC. This 180 day time limit is extended to 300 days if the complainant has instituted proceedings with a local or state fair employment practice agency. 42 U.S.C. § 2000e-5(e)(1).

The Fifth Circuit has held that, under 42 U.S.C. § 2000e-5(e)(1), a discrimination charge must be filed with the EEOC within 180 days after the occurrence of the alleged discriminatory practice unless the complainant has instituted proceedings with a state or local fair employment practice agency. If the complainant has instituted state or local proceedings, the limitations period for filing such a charge with the EEOC extends to 300 days. *Griffin v. City of Dallas*, 26 F.3d 610, 612 (5th Cir. 1984). The 300-day filing period "applies regardless whether the state proceedings are timely filed under state or local law." *Id.* (citing *Mennor v. Fort Hood Nat'l Bank*, 829 F.2d 553, 554 (5th Cir. 1987)). Moreover, "a nominal filing with the proper state or local agency is all that is required to institute proceedings under the terms of section [2000e-5(e)]." *Id.* (citing *Urrutia*, 841 F.2d at 125). In *Urrutia*, the Fifth Circuit held that "this nominal-filing requirement was satisfied when the EEOC transmitted a copy of the charge to the TCHR [Texas Commission on Human Rights]" and "that the complaint there, filed with the EEOC within the 300-day period set forth in section

[2000e-5(e)], was timely." *Id.* (citing *Urratia v. Valero Energy Corp.*, 841 F.2d 123, 125 (5th Cir. 1988); *Washington v. Patlis*, 868 F.2d 172 (5th Cir. 1989)). In *Griffin*, the Fifth Circuit ruled that the EEOC's acceptance of the plaintiff's discrimination charge satisfied the nominal-filing requirement and also "instituted proceedings with" the TCHR because the EEOC received the charge as the TCHR's agent under a "Worksharing Agreement" between the two agencies. *Id.* Thus, the "institution of state proceedings extended the statute of limitations to 300 days." *Id.* at 613.

Baylor contends that Warner did not initiate a filing with the Texas Commission on Human Rights ("THCR [sic]"), the State of Texas fair employment practice agency, because Warner herself did not direct the EEOC to forward the complaint to the TCHR. This argument, however, seems to overlook the Workshare Agreement that exists between the EEOC and the TCHR. This workshare agreement makes Texas a "deferral" state. *Messer v. Meno*, 130 F.3d n. 2 (5th Cir. 1997); *Griffin*, 26 F.3d at 612; *Washington v. Patlis*, 868 F.2d 172 (5th Cir. 1989); *Urrutia v. Valero Energy Corp.*, 841 F.2d 123, 125 (5th Cir. 1988). In a deferral state, like Texas, the receipt of a charge by the EEOC is sufficient to meet the statutory requirement of filing with the state agency to employ the statutory extension to 300 days.

When Warner initiated a charge with the EEOC on January 27, 1997, this filing also initiated a charge with the TCHR under the workshare agreement between the two agencies. Thus, the deadline for Warner to file her charge with the EEOC was extended to 300 days after the last incident of alleged discriminatory conduct by Baylor.

Because of the extension in the deadline to file, Warner did timely file her charge with the EEOC. Therefore, Baylor's motion on the ground that Warner failed to timely file with the EEOC is **DENIED**.

## IV. Discrimination

For a discrimination claim under Title VII, the plaintiff bears the burden of proving a *prima facie* case by a preponderance of the evidence. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 506 (1963); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). To establish a prima facie case in the context of a denial of tenure, the plaintiff must show that: (1) she belongs to a protected group, (2) she was qualified for tenure, and (3) she was denied tenure in circumstances permitting an interference of discrimination. *Tanik v. Southern Methodist University*, 116 F.3d 775, 775 (5th Cir. 1997); *Zahorik v. Cornell University*, 729 F.2d 85, 92 (2nd Cir. 1984). To establish a prima facie case complaining of other employment decisions, the plaintiff must show that: (1) she belongs to a protected group, (2) she was qualified for the position in question; (3) the employer made an adverse employment decision despite the plaintiff's qualifications; and (4) the plaintiff was replaced with a person not within the protected class. *Portis v. First National Bank*, 34 F.3d 325, 328 n. 6 (5th Cir. 1994).

The courts have developed a three step burden shifting analysis in Title VII cases. If the plaintiff establishes a prima facie case, then she has raised a presumption of discrimination and the burden shifts to the defendant to articulate some legitimate, non-discriminatory reason for

the challenged action. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). If the defendant meets this burden by presenting evidence which, if believed by the trier of fact, would support a finding that unlawful discrimination was not the cause of the employment action, then the plaintiff is left with the ultimate burden, which has never left her: that of proving that the defendant intentionally discriminated against her. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 502-12 (1993). Once the defendant articulates a legitimate, nondiscriminatory reason for its employment decision, the plaintiff must demonstrate with substantial evidence that the proffered reasons are false and are merely a pretext for unlawful discrimination. *U.S. Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711 (715-16 (1983); *Swanson v. GSA*, 110 F.3d 1180 (5th Cir. 1997).

The two employment actions by Baylor of which Warner complains are: (1) Dr. Sloan's decision to affirm the University Tenure Committee's ("UTC") recommendation to deny tenure to Warner; and (2) Dr. Schmeltelkopf's decision to relieve Warner of her duties as Associate Dean.

**1. Tenure**

In order to be successful on her claim of discrimination in Dr. Sloan's decision, Warner must make a prima facie showing that she was qualified for tenure and that she was denied tenure under circumstances permitting an inference of discrimination. Viewing the disputed facts in the light most favorable to Warner, the Court finds the

following: The tenure process at Baylor is well documented by both parties. It is a multi-level recommendation process culminating in a decision by the president, Dr. Sloan. Throughout this review process the candidate must "conclusively demonstrate" a right to tenure. The process begins with a review of the candidate's qualifications by the tenured faculty within the candidate's department. The candidate generates a "tenure dossier" which highlights her qualifications for tenure. This dossier is reviewed by the UTC, which then makes a recommendation to Dr. Sloan.

The Department of Museum Studies has no tenured faculty members. Baylor established a review committee to replace the initial tenure review step ordinarily conducted by the tenured faculty in the candidate's department. Warner's review committee was made up of faculty members with whom she had previously worked. One of the members of the committee, Dr. Ben Pierce, conducted interviews with Warner's colleagues in the Museum Studies department. Dr. Pierce reported negative information obtained from two of Warner's colleagues to the review committee. Dr. Pierce considered Warner's credentials above average for Baylor and found that student evaluations of Warner were satisfactory. Dr. Pierce, however, found that the information obtained from Warner's male colleagues conflicted with the information in Warner's dossier. Dr. Pierce also believed that Warner was not qualified in the museum studies discipline. Despite Dr. Pierce's misgivings, the initial review committee recommended tenure in a four to one vote.

The UTC then reviewed Warner's dossier. The UTC unanimously voted on the first ballot to recommend a

denial of tenure. The UTC then reviewed a male candidate's application for tenure and recommended a denial of tenure but suggested he be given additional time to further develop his credentials. As a result, the UTC revisited Warner's application and again unanimously voted to deny tenure but suggested that additional time be permitted to allow Warner to bolster her credentials. This final recommendation was the UTC recommendation forwarded to Dr. Sloan.

Dr. Sloan denied Warner tenure. During the same tenure review period, Dr. Sloan denied tenure to two male candidates despite the UTC's recommendation to grant tenure. Baylor granted tenure to nine female candidates and denied tenure to only one candidate – Warner.

Based on these facts, viewed in the light most favorable to the plaintiff, Warner has failed to raise a genuine issue of material fact on whether she was qualified for tenure. The evidence demonstrates that the UTC, through two reviews of Warner's tenure dossier, determined that she was not entitled to tenure. The Court recognizes that "tenure decisions in an academic setting involve a combination of factors which tend to set them apart from employment decisions generally." *Zahorik v. Cornell Univ.*, 729 F.2d 85, 92-93 (2d Cir. 1984). In *Zahorik*, the Second Circuit noted the reluctancy of the courts to review the merits of a tenure decision as a factor setting apart academic employment decisions from typical employment decisions. Moreover, the Court is not in the best position to determine whether a well-educated individual should be entitled to a continuing expectation of employment. Rather, the individual's tenured colleagues, through a

multi-tiered review process like Baylor's, are best able to determine the qualifications for tenure.

Furthermore, assuming, *arguendo*, that Warner was able to raise a fact issue on her qualifications for tenure, she has not demonstrated a fact issue on whether she was denied tenure in circumstances permitting an interference of discrimination. Dr. Sloan's denial of tenure to two male candidates despite the recommendation of the UTC to grant tenure and the granting of tenure to nine other female candidates is sufficient evidence to dispel any inference of gender bias in the decision to deny Warner's application for tenure.

**2. Associate Dean Position**

In order to be successful on her claim of discrimination in Dr. Schmeltekopf's decision, Warner must show that Baylor's proffered reason for removing Warner from the Associate Dean position was a pretext from discrimination. Even if Warner can establish a prima facie case of discrimination in the decision to remove her from the Associate Dean's position, it remains Warner's burden to prove that Baylor's proffered reason for removing her from the Associate Dean position was false. Here, Baylor claims that Warner was removed from this position because, following numerous complaints lodged against Warner by students, applicants, and other faculty members, and following counseling concerning these complaints, Warner's professional conduct did not improve. Warner has presented no evidence which would indicate that Baylor's proffered reason is false. Therefore, Warner has failed to meet her ultimate burden in this case; to

prove that the defendant intentionally discriminated against her. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 509-12 (1993). The plaintiff must demonstrate that defendant's proffered reasons are false and are merely a pretext for unlawful discrimination. *U.S. Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711 (715-16 (1983); *Swanson v. GSA*, 110 F.3d 1180 (5th Cir. 1997). This, Warner has failed to do.

Thus, Baylor's motion on the ground that Warner was [sic] failed to establish a prima facie case of discrimination or to produce evidence that Baylor's proffered reasons for its employment decisions regarding Warner were a pretext for discrimination is **GRANTED**.

**V. Retaliation**

To support her Title VII retaliation claim, the plaintiff must show that (1) she engaged in a protected activity, (2) an adverse employment action occurred, and (3) a causal link exists between her participation in the protected activity and the adverse employment action. *Dollis v. Rubin*, 77 F.3d 777, 781 (5th Cir. 1995). Once Plaintiff has established a *prima facie* case, the burden of production shifts to the defendant to articulate a legitimate, non-retaliatory reason for Plaintiff's discharge. *McMillan v. Rust College, Inc.*, 710 F.2d 1112, 1116 (5th Cir. 1983). Plaintiff must then show that defendant's reason is merely a pretext for discrimination. *Id.* at 1116.

Therefore, the ultimate issue in determining summary judgment on a retaliation claim is whether the plaintiff can produce evidence which could support a finding that she would not have been fired in the absence

of her having engaged in protected conduct. *Shackelford v. Deloitte & Touche*, LLP, 190 F.3d 398 (5th Cir. 1999); *Long v. Eastfield College*, 88 F.3d 300, 304 n. 4 (5th Cir. 1996) ("ultimate determination in an unlawful retaliation case is whether the conduct protected by Title VII was a 'but for' cause of the adverse employment decision") (citing *McDaniel v. Temple Indep. Sch. Dist.*, 770 F.2d 1340, 1346 (5th Cir. 1985)).

Warner claims that she was denied tenure for her opposition to the treatment of one of Warner's subordinates in the Associate Dean's Office, Ms. Mary Lou Black. Warner referred Ms. Black to the Personnel Office at Baylor because Ms. Black had complained of her supervisor, Mr. David Lintz. In order to be considered "opposition," Warner must explicitly communicate to Baylor her belief that Baylor's treatment of Ms. Black was employment discrimination under Title VII. *Barber v. CSX Distrib. Serv.*, 68 F.3d 694 (3d Cir. 1995); *Jones v. Flagship Int'l*, 793 F.2d 714, 727-28 (5th Cir. 1986). Warner's duty as an employee to refer situations like Ms. Black's to the Personnel Office cannot be considered opposition under Title VII. *Id.* Warner's second claim of opposition arises from a conversation concerning the curator of the Historic Village located at Baylor, Ms. Deborah Reid. Warner's own recollection indicates that the gist of the conversation was an inquiry concerning why the curator of the village did not reside in the village. There was no discussion of discrimination. Therefore, these instances cannot be considered opposition to discrimination by Baylor.

Additionally, Warner has produced no evidence which indicates that the UTC, Dr. Sloan, or Dr. Schmeltekopf were aware of these instances of alleged opposition when they made their employment decisions concerning Warner. With no such showing, there can be no causation nexus between Warner's claimed opposition and Baylor's employment decisions. Warner failed to prove that "but for" her opposition, she would have been granted tenure because the decision-makers had no knowledge of her opposition and still chose to deny tenure. Thus, Warner has failed to create a fact issue on the prima facie elements of her claim for retaliation.

Even if she were to meet her burden on the prima face case for retaliation, the evidence produced by Warner on her retaliation claim, like the evidence produced on Warner's discrimination claim, fails to demonstrate that Baylor's proffered reasons for Warner's denial of tenure and for her removal from the Associate Dean's position are false and are merely a pretext for unlawful retaliation. Warner has thus failed to met her ultimate burden in this case and her claims must fail as a result. *Shackelford*, 190 F.3d 398; *Long*, 88 F.3d at 304.

Accordingly, it is

**ORDERED** that Defendant's Motion for Summary Judgment is **DENIED** only as to the timeliness of the filing of the Plaintiff's Administrative Charge with the EEOC. It is further

**ORDERED** that Defendant's Motion for Summary Judgment is **GRANTED** in all other respects. It is further

**ORDERED** that Defendant's Motion to Exclude Plaintiff's Expert Witness Dee Blinka is **DENIED** as moot.

**SIGNED** this 14th day of September 2000.

/s/ Walter S. Smith, Jr.
WALTER S. SMITH, JR.
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF TEXAS

DR. CHERYL GONCE-WARNER
Plaintiff

V.

BAYLOR UNIVERSITY
Defendant

**JUDGMENT IN A CIVIL CASE**

Case Number:
W-98-CA-356

Jury Verdict. This action came before the Court for a trial by jury. The issued have been tried and the jury has rendered its verdict.

X Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED
that Defendant's Motion for Summary Judgment is DENIED only as to the timeliness of the filing of the Plaintiff's Administrative Charge with the EEOC. It is further ORDERED that Defendant's Motion for Summary Judgment is GRANTED in all other respects. It is further ORDERED that Defendant's Motion to Exclude Plaintiff's Expert Witness Dee Blinka is DENIED as moot.

September 14, 2000
Date

William G. Putnicki
Clerk

/s/ _____
(By) Deputy Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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No. 00-51235

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CHERYL GONCE-WARNER, DR

Plaintiff-Appellant-Cross-Appellee

v.

BAYLOR UNIVERSITY

Defendant-Appellee-Cross-Appellant

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Appeals from the United States District Court for the Western District of Texas, Waco

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**ON PETITION FOR REHEARING**

(Filed Jan. 9, 2002)

Before KING, Chief Judge, DAVIS and MAGILL,* Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is denied.

ENTERED FOR THE COURT:

/s/ Davis
United States Circuit Judge

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* Circuit Judge of the 8th Circuit, sitting by designation.